United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-3012

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In The

United States Court of Appeals

For The Second Circuit

EXCHANGE NATIONAL BANK OF CHICAGO, ROBERT E. SLATER, ALL-AMERICAN LIFE & CASUALTY COMPANY, GENERAL UNITED LIFE INSURANCE COMPANY, AND O'HARE INTERNATIONAL BANK (N.A.),

Petitioners,

- against -

INZER B. WYATT, United States District Judge, Southern District of New York, and ROY BABITT, Bankruptcy Judge, Southern District of New York,

Respondents.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

WEIS SECURITIES, INC., et al,

Defendants.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS TO HONORABLE INZER B. WYATT, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK; AND FOR WRIT OF PROHIBITION TO HONORABLE ROY BABITT, BANKRUPTCY JUDGE, SOUTHERN DISTRICT OF NEW YORK; AND FOR OTHER RELIEF.

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IN THE UNITED STATES COURT OF APPEALS

for the Second Circuit

No. 75-3012

EXCHANGE NATIONAL BANK OF CHICAGO, ROBERT E. SLATER, ALL-AMERICAN LIFE & CASUALTY COMPANY, GENERAL UNITED LIFE INSURANCE COMPANY, AND O'HARE INTERNATIONAL BANK (N.A.), Petitioners,

v.

INZER B. WYATT, United States District Judge, Southern District of New York, and ROY BABITT, Bankruptcy Judge, Southern District of New York, Respondents,

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SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

WEIS SECURITIES, INC., et al,
Defendants.

Petitioners' brief in support of petition for writ of mandamus to Honorable Inzer B. Wyatt, United States District Judge, Southern District of New York; and for writ of prohibition to Honorable Roy Babitt, Bankruptcy Judge, Southern District of New York; and for other relief.

Preliminary Statement

This matter is before the court on a petition for writs of mandamus and/or prohibition, which this court agreed to entertain by its order of March 4, 1975. By order dated May 31, 1973, the district court, by then District Judge Murray I. Gurfein, made a general reference of a liquidation proceeding under the Securities Investor Protection Act of 1970, 15 U.S.C. §78aaa et seq. (hereinafter the "1970 Act"), to referee in bankruptcy Roy Babitt (now a bankruptcy judge). Pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, petitioners "suggested" to Bankruptcy Judge Babitt that the reference order was invalid because unauthorized, and that he and the bankruptcy court lacked subject matter jurisdiction over liquidations under the 1970 Act.

When the bankruptcy judge requested that the issue be placed directly before the district court, petitioners applied to District Judge Inzer B. Wyatt for a declaratory judgment to the effect that the reference of a liquidation under the 1970 Act to the bankruptcy court or an officer of the bankruptcy court was unauthorized and inconsistent with

the exclusive jurisdiction over such a proceeding imposed by Congress on the district court. Judge Wyatt, electing to treat petitioners' application as a motion to vacate the May 31, 1973 reference order, denied the application from the bench following argument on February 14, 1975. On March 3, 1975, petitioners filed their petition for writs of mandamus and/or prohibition and also filed a notice of appeal relating to Judge Wyatt's order of February 14, 1975.

Statement of Issues

The sole issue, simply stated, is whether the 1970 Act authorizes the district court to make a general reference of a liquidation proceeding under that Act to an officer of the bankruptcy court?

But while this issue can be simply stated, it contains inherent complexities that can only be resolved by considering the following subsidiary issues. (a) Are the district court and the bankruptcy court separate, distinct courts? (b) Does the 1970 Act enlarge the limited subject matter jurisdiction of the bankruptcy court or the referee in bankruptcy? (c) Is a referee in bankruptcy an officer of the district court as well as of the bankruptcy court? (d) Is the

general reference by the district court to an officer of the bankruptcy court consistent with the "exclusive jurisdiction" imposed on the district court by Congress in the 1970 Act?

Petitioners submit that the reference is unauthorized: that the two courts are separate and distinct; that a referee in bankruptcy is an officer solely of the bankruptcy court; that the 1970 Act does not enlarge the jurisdiction of the bankruptcy court or a referee in bankruptcy; and that such a reference is inconsistent with the district court's exclusive jurisdiction.

Statement of the Case

On December 30, 1970, the 1970 Act, Public Law 91-598, 84 Stat.1636 et seq., was signed into law as a section of and an amendment to the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. (hereinafter the "1934 Act").[1] The 1970 Act established the Securities Investor Protection Corporation (hereinafter "SIPC") and set forth provisions for the liquidation of broker-dealers and the protection of their customers. The need for such legislation was overwhelming. As stated in H.R.Rep.No.1613, 91st Cong., 2d sess.(1970); 1970 U.S.Code Cong. & Adm.News, 5254, 5255:

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1. Section 2 of the 1970 Act, 15 U.S.C.§78bbb, provides: "Except as otherwise provided in this chapter, the provisions of the Securities Exchange Act of 1934... apply as if this chapter constituted an amendment to, and was included as a section of, such Act."

> "The serious and persistent financial problems besetting the securities industry in recent months have led to the voluntary liquidations, mergers, receiverships or, less frequently, bankruptcies of a substantial number of brokerage houses. Such failures may lead to loss of customers' funds and securities with an inevitable weakening of confidence in the U. S. securities markets. Such lessened confidence has an effect on the entire economy. Whatever other steps must be taken to improve these conditions, one objective of the bill, as reported, is to provide investors protection against losses caused by the insolvency of their broker-dealer. The need is similar, in many respects, to that which prompted the establishment of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation.
>
> "As the Congress recognized in 1933 when it enacted the first Federal Securities Act, ' ... securities are intricate merchandise.' (H.R.Rep. No. 85, 73d Cong., 1st sess., May 4, 1933.) So, too, it has come to be recognized that the securities business is an intricate business. In some respects the industry is unique, and its problems and practices require original solutions. Broker-dealers, among their many obligations, are responsible for safeguarding billions of dollars in cash and securities which belong to investors. There are today in this country over 26 million shareholders, many of whom have either cash or securities or both in the custody of broker-dealer firms."

The backdrop of the 1970 Act included the collapse of the New York Stock Exchange special trust fund.

In 1938, Congress had enacted §60e of the Bankruptcy Act, 11 U.S.C. §96e, to provide special rules for stockbroker bankruptcies. The administration and enforcement of that section demonstrated its many shortcomings. Thus Congress chose not to amend that section, but drafted the 1970 Act to provide for special liquidation proceedings outside the Bankruptcy Act.

"The bill, as reported, establishes procedures, for the prompt and orderly liquidation of SIPC members when required. The liquidation of stockbrokers is at present governed by section 60e of the Bankruptcy Act (11 U.S.C. 96), enacted in 1938. Over the years certain shortcomings in section 60e have become apparent (see, for example, Report of the Special Study of Securities Markets, H.R.Doc. No. 95, 88th Cong., 1st sess., ch. III, pt. 1, p. 410 et seq., 1963). Because payments of SIPC funds to customers of SIPC members in liquidation can be made only as an integral part of liquidation proceedings, the bill provides that SIPC members will be liquidated in special proceedings outside the Bankruptcy Act. In so doing, the bill also seeks to remedy the shortcomings in section 60e referred to above." H.R.Rep.1613, 91st Cong., 2d sess., (1970): 1970 U.S. Code Cong. & Adm. News, 5254, 5262.

The 1970 Act also adopted the provisions for exclusive jurisdiction in the district court found at §§21e and 27 of the 1934 Act, 15 U.S.C. §§78u(e) and 78aa.

A. Weis Securities, Inc.

On May 24, 1973, the Securities & Exchange Commission (hereinafter the "SEC") commenced an action against a broker-dealer known as Weis Securities, Inc. (hereinafter "Weis") and various of its officers and directors in the United States District Court for the Southern District of New York, index number 73 Civil 2332. The action was assigned for all purposes to District Judge Inzer B. Wyatt. The complaint charged Weis

with violation of the net capital requirements of Rule 325 of the New York Stock Exchange; with the making of false and misleading entries in its books and records; with propagating false financial information to the public; and with other violations of the federal securities laws and regulations. The complaint sought a multiplicity of relief including a temporary restraining order, a preliminary injunction, a permanent injunction against the defendants and the appointment of a receiver.

At the same time that the SEC complaint was being filed with the district court clerk, SIPC filed an application with said clerk pursuant to section 5(a)(2) of the 1970 Act, 15 U.S.C. §78eee(a)(2), requesting that the district court enter a decree adjudicating that the customers of Weis were in need of protection under the 1970 Act and seeking appointment of the liquidation trustee and counsel to the trustee specified by SIPC pursuant to section 5(b)(3) of the 1970 Act, 15 U.S.C. §78eee(b)(3), and seeking other relief as well. (See exhibit A annexed to the petition.)[2]

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2. References to the exhibits annexed to the petition will hereinafter appear as __ "Pet., ex. "_"."

On May 25, 1973, on application of the SEC, the district court issued its order to show cause, returnable on May 30, 1973, containing a temporary restraining order, requiring Weis and the other defendants to show cause why the relief requested in the complaint should not be granted. On May 30, 1973, then District Judge Gurfein (sitting in the stead of District Judge Wyatt who was engaged in a criminal trial) granted the SIPC application with the consent of the SEC, making findings (pet., ex. "B") and entering an order (pet., ex "C"). The eighth decretal paragraph of the district court order stated:

> "VIII. ORDERED that this court shall retain jurisdiction of this matter for all purposes."

The May 30, 1973 order also appointed Edward S. Redington as liquidation trustee, and the firm of Hughes, Hubbard & Reed as counsel for said trustee, both trustee and counsel having been specified by SIPC.

The trustee's counsel thereupon made an application to the district court for a general reference of the liquidation proceeding to a referee in bankruptcy pursuant to the provisions of section 22 of the Bankruptcy Act, 11 U.S.C. §45. (Pet., ex. "D".) The application concerned itself solely with which of two

reference provisions found in the Bankruptcy Act at §§22 and 117, 11 U.S.C. §§45 and 517, should be utilized in a liquidation under the 1970 Act. The application concluded "that it is appropriate and desirable for this proceeding to be generally referred to a Referee of this Court under Section 22 of the Bankruptcy Act..." (Emphasis supplied.)

The three page application failed to discuss, raise or ever refer to the threshhold jurisdictional questions which were obviously not then considered, nor even recognized to exist. Upon closer reading there is also an obvious question raised regarding the phrase "...Referee of this Court..." Does that phrase refer to a "court of bankruptcy"[3] or to the district court?[4] Which court was described as "...this Court..." in the eighth decretal paragraph of the May 30, 1973 order? (Pet.,ex."C.")

On May 31, 1973, District Judge Gurfein entered the following order (pet., ex. "E"):

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3. The "courts of bankruptcy" were established and created at Bankruptcy Act §2a, 30 Stat. 544, 11 U.S.C. §11a, pursuant to Article I, §8, clause 4 of the United States Constitution.

4. The district courts were established by Congress in Public Law 773-647, 62 Stat. 869, 28 U.S.C. §132, pursuant to the authority of Article III, §1 of the Constitution.

> "ORDERED, that the above entitled proceeding be and it hereby is, referred generally to the Hon. Roy Babitt, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required and permitted under the Securities Investor Protection Act of 1970." (Emphasis supplied.)

This order, the form of which was undoubtedly drafted by the trustee's counsel, also contains the enigmatic reference to "...this Court..." without indicating which court is intended, i.e., the district court or the bankruptcy court.

B. Proceedings Before the Referee

The five petitioners had all purchased securities (i.e., subordinated notes) from Weis. In June of 1973, each of them elected to rescind their purchase of securities under the applicable federal and local law. Subsequent to that time, the trustee commenced various proceedings against petitioners and others before Bankruptcy Judge Babitt. More particularly, the trustee has commenced an "adversary proceeding" before Bankruptcy Judge Babitt to recover over $985,000.00 from petitioner Exchange National Bank of Chicago. In that proceeding it was suggested to the Bankruptcy Judge, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, that the May 31, 1973 order of general reference was jurisdictionally defective, and that because Congress had reposed exclusive jurisdiction over the debtor and its property in the district court, the

bankruptcy court had no jurisdiction over the subject matter of the adversary proceeding. The other petitioners joined in this position.

Bankruptcy Judge Babitt heard oral argument on this jurisdictional issue and other issues on January 22, 1975. At that time he noted that he had no law clerk, no law library, heavy administrative as well as judicial burdens[5] which prevent his taking sustained absences from his courtroom or chambers to conduct non-bankruptcy research, an extraordinary bankruptcy calendar exacerbated by two liquidations under the 1970 Act, and no experience with the federal securities laws. The Bankruptcy Judge, however, did not decide the jurisdictional issue, but requested that the issue be presented directly to the district court. He agreed to stay further proceedings pending determination of the issue before the district court. On February 3, 1975, petitioners applied to District Judge Wyatt for a declaratory judgment to the effect that a reference by the district court of a liquidation under the 1970 Act to the bankruptcy court or an officer of the bankruptcy court

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5. The particular administrative burden is recognized by Congress in a pending bill, H.R. 10792, which seeks revision of the Bankruptcy Act.

was unauthorized. The trustee and SIPC appeared in opposition. The application was argued before District Judge Wyatt on February 14, 1975, with the judge electing to treat the application as a motion to vacate the general reference order of May 31, 1973 (pet., ex. "E"). Making it quite clear that he wished to avoid having contests between the trustee and creditors determined in the first instance by the district court (pet., ex. "F", at 12-13), Judge Wyatt denied petitioners' motion to vacate. He chose to adopt the position set forth in Collier on Bankruptcy that section 22 of the Bankruptcy Act, 11 U.S.C. §45, was not inconsistent with the 1970 Act. (Pet., ex. "F", at 34). The result of accepting the Collier analysis adopted by Judge Wyatt would be to enlarge the jurisdictional authority of a bankruptcy judge without express statutory authority, and would do violence to the express Congressional intent of having liquidations under the 1970 Act conducted outside of the Bankruptcy Act. See infra, at 17.

The district court misconceived the burden of persuasion and failed to deal with the jurisdictional questions. The bankruptcy court's jurisdiction must be affirmatively shown, particularly since that court is a court of limited jurisdiction, and a different court, i.e., the district court, has exclusive jurisdiction.

Argument

THE 1970 ACT DOES NOT AUTHORIZE A GENERAL REFERENCE TO A REFEREE IN BANKRUPTCY

SIPC is presently considering recommending to Congress the following amendment to the 1970 Act:

> "Once the Federal District Court had adjudicated the need for SIPC protection and appointed a trustee, [the 1970 Act should] provide for a liquidation proceeding to be generally referred to the Bankruptcy Court in the territorial district in which the broker or dealer maintains its principal place of business, and that Bankruptcy Court shall have exclusive jurisdiction over the broker or dealer and its property whereever situated." Report of the Special Task Force to Consider Possible Amendments to the Securities Investor Protection Act of 1970, at 36 (July 31, 1974).[6] (Pet., ex. "G").

This proposed amendment can only be properly understood in the context of the existing jurisdictional provision of the 1970 Act. Section 5(b)(2) of the 1970 Act, 15 U.S.C. §78eee(b)(2), provides, inter alia, that:

> "Upon the filing of an application pursuant to subsection (a)(2) of this section, the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located..."

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6. Edward S. Redington, the liquidation trustee of Weis is a member of the task force that prepared the report.

Under §5(a)(2) of the 1970 Act, 15 U.S.C. §78eee(a)(2), the SIPC application may be made to "...any court of competent jurisdiction specified in section 78aa or 78u(a) of this title..." Looking at 15 U.S.C. §78aa and 78u(a), i.e., §§27 and 21c of the 1934 Act, it is apparent that exclusive jurisdiction resides in the district court. Thus Collier notes:

> "Exclusive jurisdiction over SIPA proceedings [i.e. proceedings under the 1970 Act] is vested in the United States District Courts." 3 Collier on Bankruptcy, ¶60.80[2.4], at 1232 (14th ed. 1974).

Why is the proposed amendment necessary? The Special Task Force apparently recognized that the district court and the bankruptcy court are separate, distinct courts and that in vesting the district court with exclusive jurisdiction, Congress denied jurisdiction to the bankruptcy court.

A. The bankruptcy courts and the district court are separate, distinct courts with different jurisdictional bases.

"The Congressional power to ordain and establish inferior courts includes 'the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " Lockerty v. Phillips, 39 U. S. 182, 188 (1943).

It is axiomatic "... that clear stautory authority must exist to found jurisdiction...." Carroll v. United States, 354 U. S. 394, 399 (1957).

As previously noted [see notes 3 and 4, supra] Congress created the bankruptcy courts pursuant to the authority of Article I, §8 of the Constitution, while the district courts were created under Article III, §1. The practical result of this distinction is that referees in bankruptcy (now bankruptcy judges) do not have the complete independence guaranteed by Article III, §1,[7] but are appointed for six year terms by the district court. Of course, the definition of "courts of bankruptcy" includes the district courts. Bankruptcy Act §1(10), 11 U.S.C.§1(10). But while a district court can sit as a "court of bankruptcy" in specific instances, the bankruptcy court and the referees never sit as the "district court."

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7. Article III, §1 of the Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, shich shall not be diminished during their Continuance in Office."

The bankruptcy court, whether acting through a judge[8] or referee in bankruptcy,[9] is a court of limited jurisdiction. Thus Bankruptcy Act §2a, 11 U.S.C. §11a, states:

> "Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers and during their respective terms, as they are now or may be hereafter held ...." (Emphasis supplied.)

Congress determines "...the scope of jurisdiction of the lower federal courts....", Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156, 159 (1939), and by the express provisions of the Bankruptcy Act, the scope of the bankruptcy court's jurisdiction is limited to proceedings under the Bankruptcy Act.

A liquidation under the 1970 Act is not a proceeding under

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8. Under 28 U.S.C. §132, the district judges are the district court.

9. The "referee, after reference...is the court of bankruptcy ..." In re Rubin's Department Store, Inc., 75 F.2d 731 (7th Cir. 1935), cert. denied 296 U.S. 578 (1935).

the Bankruptcy Act. The 1970 Act was enacted as a section of and an amendment to the 1934 Act. See, §2 of the 1970 Act, 15 U.S.C. §78bbb. Thus the committee report from the House of Representatives on H.R. 19333, which was to be enacted with minor changes as the 1970 Act, noted:

> "... the bill provides that SIPC members will be liquidated in special proceedings outside the Bankruptcy Act...." H.R. Rep. 1613, 91st Cong., 2d sess. (1970), 1970 U.S. Code Cong. & Adm. News, at 5262.

SIPC's memorandum before Judge Wyatt, at pages 6 and 7, quotes Senator Bennett of Utah making a similar statement during the Senate floor debate:

> "Therefore, this bill provides that SIPC members will be liquidated in special proceedings outside the Bankruptcy Act...." 116 Cong. Rec. 40905 (1970).

See also, 3 Collier on Bankruptcy, ¶60.79, at 1229 (14th ed. 1974).

Congress, obviously familiar with the jurisdictional limitations of the bankruptcy courts, i.e. that the bankruptcy court's subject matter jurisdiction was limited to proceedings under the Bankruptcy Act, intentionally enacted the 1970 Act to provide for liquidation of a broker-dealer "...in special proceedings outside the Bankruptcy Act...."

Since jurisdictional statutes are closely construed, Sk[illegible]y Oil Co. v. Philips Petroleum Co., 339 U.S. 667 (1950); McCord v. Dixie Aviation Corporation, 450 F.2d 1129, 1131 (10th Cir. 1971), there is no basis for a conclusion that the bankruptcy court has jurisdiction over a liquidation under the 1970 Act.[10] "A contrary interpretation would in affect convict the Congress of ignorance as to what it was doing." Arkansas Valley Industries v. Freeman, 415 F.2d 713, 718 (8th Cir. 1969). It is incumbent on Congress, and not the judiciary, to shift the judicial and administrative burden created by proceedings under the 1970 Act from the district courts to the courts of bankruptcy if Congress so desires. The proposed amendment is the appropriate and only proper means of affecting the jurisdictional change.

B. The jurisdiction and authority of a referee in bankruptcy are limited by statute and the referee is not an officer of the district court except insofar as the district court sits as a court of bankruptcy.

"In general, the powers and authority of a referee in bankruptcy are set out in section 38 of the Bankruptcy Act as amended (11 U.S.C. §66)." In re McMurray, 8 F. Supp. 449 (D. Iowa 1934). Bankruptcy Act §38, 11 U.S.C. §66, provides:

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10. Collier even notes that in a liquidation under the 1970 Act "[t]he court does not sit as a court of bankruptcy..." 3 Collier on Bankruptcy, ¶60.82[1.2] at 1337 (14th ed. 1974).

> "Jurisdiction of Referees. Referees are hereby invested, subject always to a review by the judge, with jurisdiction to (1) consider all petitions referred to them and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or showing his sickness or inability to act; (4) grant, deny, or revoke discharges, determine the dischargeability of debts, and render judgments thereon; (5) confirm or refuse to confirm arrangements or wage-earner plans, or set aside the confirmation of wage-earner plans and reinstate the proceedings or cases; (6) perform such of the duties as are by this Act conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy or their respective districts, except as herein otherwise provided; and (7) during the examination of the bankrupt, or during other proceedings, authorize the employment of stenographers for reporting and transcribing proceedings at such reasonable expense to the estate as the court may fix." (Emphasis supplied.)

Referees in bankruptcy are officers of the bankruptcy court. Weidhorn v. Levy, 253 U.S. 268, 271 (1920); Chandler v. Perry, 74 F.2d 371, 373 (5th Cir. 1934); Warren v. Security-First Nat. Bank, 121 F.2d 822 (9th Cir. 1941). In fact, after reference, the referee in bankruptcy is the bankruptcy court. In re Rubin's

Department Store, Inc., supra. Like the bankruptcy court, the referee's jurisdiction is limited to proceedings under the Bankruptcy Act. This limitation excludes "proceedings outside the Bankruptcy Act" such as proceedings under the 1970 Act. This is obviously a legislative matter. Only if the proposed amendment to the 1970 Act, supra, at 13, is enacted into law will the scope of the referee's jurisdiction encompass a liquidation under the 1970 Act.

C. Section 22 of the Bankruptcy Act does not enlarge the jurisdiction or authority of a referee in bankruptcy.

Judge Wyatt was "persuaded that the position taken in Collier [on Bankruptcy] is correct..." (Pet., ex "F," at 34.) The Collier analysis is simple and straightforward. Before lapsing into a discussion of the relative merits of the reference provisions found at §§22 and 117 of the Bankruptcy Act, 11 U.S.C. §§45 and 517, Collier states:

> "....The reference of the case to a referee in bankruptcy is not in conflict or inconsistent with any provision of SIPA [the 1970 Act]. Nor is it inconsistent with the general purpose of SIPA. Accordingly, the provisions of the Bankruptcy Act relating to reference of the proceeding to a referee must be regarded as applicable." 3 Collier on Bankruptcy, ¶60.86[3.2], at 1257 (14th ed. 1974).

The Collier analysis had been attributed to Bankruptcy Judge Herzog:

> "Bankruptcy Judge Herzog takes the position that reference by the district court judge to the bankruptcy judge, as a general proposition, is a lawful exercise of the judicial power granted to the district judge in a SIPA adjudication. He arrives at this conclusion by a rather straightforward analysis of section 6(c)(1) of SIPA, which incorporates applicable Bankruptcy Act provisions into SIPA. Since he sees no inconsistency between the provisions or purpose of SIPA and those of the Bankruptcy Act, he believes that reference is authorized by either section 22 of ordinary bankruptcy or section 117 of chapter X. He does, however, favor section 22 as the source for the delegation of authority, on the theory that the SIPA proceeding is more akin to a liquidation than to a reorganization. Nevertheless, whether section 22 or section 117 applies, the outcome is the same: the district judge can retain the entire matter, refer the entire matter to a bankruptcy judge, qua bankruptcy judge, or refer the entire matter or any part thereof to the bankruptcy judge as special master to hear and report." Karmel & Weissman, "Taking Stock of the Court's Jurisdiction In a SIPA Liquidation," 41 Brooklyn Law Review 7 (1974).

That article also notes:

> "Although the SIPA liquidation proceeding is commenced and generally conducted before a federal district court judge, it has been the practice of some district court judges, particularly in the Southern District of New York, to refer the case in whole or in part to a bankruptcy judge. Neither the statutory language nor the legislative history directly authorizes or prohibits such a reference. Two threshold questions therefore arise: whether or not delegation of the SIPA proceeding to a bankruptcy judge is authorized, and what effects, if any, such delegation has upon the proceeding." Id., at 7. (Emphasis supplied.)

While the Collier analysis, relied upon by the district court, has been described as "straightforward," it is an analysis only

of §6(c)(1) of the 1970 Act, 15 U.S.C. §78fff(c)(1). That section, discussed infra, at 30, provides that the general provisions of Bankruptcy Act chapters I-VII and X are applicable to liquidation proceedings under the 1970 Act, except where they are inconsistent with the provisions of the 1970 Act. The Collier analysis could also be termed hasty and simplistic, because no consideration was given to the question of whether or not a provision of the Bankruptcy Act which provides for general reference to an officer of the bankruptcy court was consistent with §§5(a)(2) and 5(b)(2) of the 1970 Act, 15 U.S.C. §§78eee(a)(2) and 78eee(b)(2), which give the district court, and not the bankruptcy court, exclusive jurisdiction.

The obvious jurisdictional conflict will be brought into sharper focus shortly. But first the obvious inapplicability to liquidations under the 1970 Act of §22 of the Bankruptcy Act, 11 U.S.C. §45, must be explored. That section provides:

> "Reference of Petitions. a. Unless the judge or judges direct otherwise, the clerk shall refer to a referee all cases filed under Chapters I to VII, Chapter XI, and Chapter XIII of this Act.
>
> b. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another."

In reviewing the history of this section from its original form in 1898 [the judge was permitted to make a reference to a referee only after adjudication], through an amendment in

1938 [the judge was permitted to make a reference to a referee at any time], to the present form enacted in 1959 [the clerk makes an automatic reference unless the judge orders otherwise], it is clear that the present form of the statute serves the purpose of administrative efficiency. See generally, 2 Collier on Bankruptcy, ¶22.01 (14th ed. 1974).

But what is patently obvious is that section 22 applies only to "cases filed under Chapters I to VII, Chapter XI and Chapter XIII of [the Bankruptcy] Act." Even the trustee and SIPC will readily admit that a liquidation under the 1970 Act is not a case filed under the Bankruptcy Act. Certainly the legislative history indicates that liquidation proceedings under the 1970 Act are "special proceedings outside the Bankruptcy Act." See, supra, at 17.

Thus §22a of the Bankruptcy Act, 11 U.S.C. §45a, fits into the statutory scheme of that Act, being consistent with the jurisdictional provisions found at §§2a and 38 of the Bankruptcy Act, 11 U.S.C. §§11a and 66. But, as previously noted, supra, 16-20, the authority of the bankruptcy court and the referee in bankruptcy are limited in scope to proceedings under the Bankruptcy Act. Liquidations under the 1970 Act are clearly outside the ambit of the Bankruptcy Act an, therefore, outside of the jurisdiction and authority of the referee in bankruptcy.

It can be agreed that the district court has the power and authority to make references in a liquidation proceeding under the 1970 Act. But that power and authority does not arise under any provision of the Bankruptcy Act, but is found at Rule 53 of the Federal Rules of Civil Procedure. Rule 53 authorizes the reference by a district judge to a referee in bankruptcy sitting as a special master, subject of course to the limitations of subdivision (b) of that rule.[11] Such a reference is, of course, not a general reference.

It is the duty of Congress to authorize a general reference to a referee in bankruptcy if Congress believes it "....proper for the public good,...", Lockerty v. Phillips, supra, and knowingly legislates such a change. As noted by Justice Frankfurter:

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11. It is noted by Collier that where the district court exercises plenary jurisdiction as a bankruptcy court under §60b of the Bankruptcy Act, 11 U.S.C. §96b, "...the determination of difficult and complicated cases may be hastened by reference to the referee as a special master...." 3 Collier on Bankruptcy, ¶60.60[1.1], at 1106 (14th ed. 1974). This is an application of Rule 53 of the Federal Rules of Civil Procedure, which is made applicable by either the terms of General Order 37 of the Bankruptcy Orders or by Rule 513 of the Rules of Bankruptcy Procedure. (N.B. Rule 10-501 of the proposed Chapter X rules will made Rule 513 applicable to Chapter X proceedings.)

> "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951).

The proposed amendment to the 1970 Act, supra, at 13, will, if adopted, create authority for a reference. Without such an amendment, the reference is unauthorized and must fail.

D. The word "court" when used in the 1970 Act refers to the district court and the district judges and not to the referees in bankruptcy.

The Collier analysis regarding reference to a referee maintains that the use of the word "court" in the 1970 Act was intended to mean "the judge or the referee of the court of bankruptcy..." See, 3 Collier on Bankruptcy, ¶60.86[3.2] at 1257 (14th ed. 1974). But this conclusion is unwarranted.

Section 1(9) of the Bankruptcy Act, 11 U.S.C. §1(9), provides:

> "Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> * * * * * * * *
>
> "(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; ..."

This definition of "court" is by its own terms intended to apply only in construing the Bankruptcy Act. This is consistent with the general rules of statutory construction. Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 (1945); Porter v. Bledsoe, 159 F.2d 495 (4th Cir. 1947).

But Collier speculates:

> "There is no direct indication that the choice of 'court' rather than 'judge' in SIPA was deliberate, but the probabilities are that it was." 3 Collier on Bankruptcy, ¶60.86[3.2], at 1257 (14th ed. 1974).

No support for this conclusion is offered. In fact the conclusion is questioned in the Brooklyn Law Review article.

> "We would reach a different conclusion as to the meaning of the word 'court' under the 1970 Act. Under section 5 of SIPA, the word 'court' appears repeatedly in such a context as to indicate clearly that only a district judge could have been intended as the subject of the term. It seems highly implausible that Congress could have intended the initial adjudication of customer need for the 1970 Act's protection to take place before a bankruptcy judge. Similarly, although it is the 'court' which appoints the trustee in those cases where liquidation is necessary, we believe that it was there intended that the court be that of the district judge. In fact, the incorporation argument of section 6(c)(1) can only apply if a liquidation proceeding has actually commenced, since there can be no 'liquidation proceeding' within the meaning of section 6 of SIPA until the judge of the district court has determined that one is necessary.

> "It should also be noted that section 38 of the Bankruptcy Act invests the bankruptcy judge with jurisdiction over only specific matters. For example, the bankruptcy judge has jurisdiction over all 'petitions' which are referred to him. Section 1(24) of the Bankruptcy Act defines a petition as a document filed in the bankruptcy court initiating a proceeding 'under this title.' to wit, the Bankruptcy Act, title 11 of the United States Code. However, the application for a liquidation proceeding under SIPA originates from title 15, and not from title 11. The other jurisdictional grants of section 38 conferred upon the bankruptcy judge (e.g., to grant, deny, or revoke discharges) relate to specific bankruptcy matters, and also might not apply to a title 15 proceeding." Op Cit., 41 Brklyn. L. R. at 8.

It is highly doubtful that Congress used the word "court" rather than the word "judge" in the 1970 Act with the intention of bridging the jurisdictional gap between the district court and the bankruptcy court. There are simpler and more direct means of accomplishing such a result.

E. The reference of a proceeding under the 1970 Act to a referee in bankruptcy is inconsistent with the district court's exclusive jurisdiction over the debtor and its property.

It has been noted by this court that in a proceeding under the 1970 Act, the "district court has exclusive jurisdiction over the debtor and his property..." Securities Investor Protection

Corporation v. Charisma Securities Corporation, 506 F.2d 1191, 1194 (2d Cir. 1974). This conclusion flows from the explicit language of §5(b)(2), set forth supra, at 13. This conclusion can also be reached by considering §2 of the 1970 Act, 15 U.S.C. §78bbb (see supra, at 4), which makes the jurisdictional provisions of §§27 and 21e of the 1934 Act, 15 U.S.C. §§78aa and 78u(e),[12] applicable to liquidations under the 1970 Act.

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12. §27 of the 1934 Act, 15 U.S.C. §78aaa, provides, inter alia:

> "The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder...."

§21e of the 1934 Act, 15 U.S.C. §78u(e), provides:

> "(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the United States District Court of the District of Columbia or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title."

The provisions of §27 of the 1934 Act, 15 U.S.C. §78aa, which give the district court exclusive jurisdiction over all suits and actions brought under and pursuant to the 1934 Act, appears particularly applicable to proceedings under the 1970 Act. This court has determined that the words "exclusive jurisdiction" appearing in that section require that all court proceedings under the 1934 Act be initiated in the district court. Wright v. S.E.C., 112 F.2d 89, 95 (2d Cir. 1940).

The same words, i.e., "exclusive jurisdiction," also appear in §5(b)(2) of the 1970 Act, 15 U.S.C. §78eee(b)(2), and must therefore have the same meaning. The liquidation proceeding must be conducted in the court that has exclusive jurisdiction, i.e., the district court. Other provisions of the 1970 Act have to be construed so as to be consistent with the district court's exclusive jurisdiction. American Distilling Co. v. Brown, 295 N.Y. 36, 64 N.E.2d 347 (1945). In that case the corporate plaintiff sued Brown, one of its officers and directors, in the state court, to recover short-swing profits from transactions in the company's stock pursuant to §16(b) of the 1934 Act, 15 U.S.C. §78p(b). That section provides that:

> "....Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction..."

The trial court dismissed the suit for lack of jurisdiction.

The Court of Appeals affirmed, noting:

> "The controversy arises from the apparent inconsistency between the express provisions of section 16, subdivision (b), authorizing suits in 'any court of competent jurisdiction', and the provision of section 27, conferring upon the Federal courts exclusive jurisdiction 'of all suits in equity and actions at law brought to enforce any liability or duty created by this title' language which in terms comprehends the liabilities created by section 16, subdivision (b), of the Act and by other sections of the Act which also create new liabilities and grant to private suitors the right to enforce them 'in any court of competent jurisdiction.' See §9, subd. (e), and §18, subd. (a) of the Act, 15 U.S.C.A. §78i(e), 78r(a).
>
> "But this inconsistency is more apparent than real. The phrase 'in any court of competent jurisdiction' does not proprio vigore include or exclude any court but leaves to determination elsewhere the question of competent jurisdiction and, if sections 16, subdivision (b), 9, subdivision (e), and 18, subdivision (a), are read with section 27, it is quite clear that the latter section, if it is to have any force, withholds from the State courts jurisdiction to entertain suits to enforce liabilities created by the Act. Nor does this conclusion denude the phrase in section 16, subdivision (b) relating to jurisdiction, of all meaning, for it still has application to courts within the Federal system some of which would have jurisdiction to entertain the lawsuit and some of which would not." Id., 295 N.Y., at 39, 40.

At bar, the apparent conflict is more subtle. At issue is the scope of §6(c)(1) of the 1970 Act, 15 U.S.C. §78fff(c)(1).

That section provides, inter alia, that liquidations under the 1970 Act

> "...be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions...of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable..."[13]

except insofar as those provisions are inconsistent with the provisions of the 1970 Act. A provision of the Bankruptcy Act is inconsistent with the 1970 Act "if it conflicts with an explicit provision of the Act..." Securities Investor Protection Corporation v. Charisma Securities Corporation, supra, 506 F.2d at 1195.

Section 6(c)(1) of the 1970 Act, 15 U.S.C. §78fff(c)(1), must be construed so as not to conflict with §5(b)(2) of the 1970 Act, 15 U.S.C. §78eee(b)(2) and §27 of the 1934 Act, 15 U.S.C. §78aa. Just as bringing an action under the 1934 Act in state court violates the exclusive jurisdiction of the district court, reference of liquidations under the 1970 Act to an officer of the bankruptcy court violates the district court's exclusive jurisdiction. As noted in the American Distilling

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13. Use of the phrase -- "as though it were" -- clearly implies that the liquidation is outside of the Bankruptcy Act and the Bankruptcy Court. See, supra, at 17.

Co. case, supra, at 40:

> "...the phrase in section 16, subdivision (b) relating to jurisdiction...still has application to courts within the Federal system some of which would have jurisdiction to entertain the law suit and some of which would not...."

At bar, the district court has such jurisdiction while the bankruptcy court does not.

This brings us back to the question posed at pages 9 and 10, supra. Does the phrase -- "this court" -- refer to the district court or the bankruptcy court? That phrase first appears in Judge Gurfein's May 30, 1973 order. That order, which determined the need of Weis' customers for the protection of the 1970 Act, in effect, commenced the liquidation proceeding. That order was entered by the district court whose subject matter jurisdiction attached when the SEC commenced suit, §§27 and 21e of the 1934 Act, 15 U.S.C. §§78aa and 78u(e), and when SIPC filed its application under §5(a)(2) of the 1970 Act, 15 U.S.C. §78eee(a)(2). That district court was not sitting as a bankruptcy court.[14] Thus when on May 30, 1973 Judge Gurfein "ordered that this court shall retain jurisdiction of this matter for all purposes," the court in

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14. See, note 10, supra, at 18; Karmel & Weissman, supra, at 25.

question was the district court and not the bankruptcy court.

The Trustee, in drafting the form of his May 30, 1973 application (pet., ex. "D"), and of the May 31, 1973 reference order (pet., ex. "E"), created a legal anomally by referring to a "...Referee of this Court..." The referee in bankruptcy is an officer of the bankruptcy court, not the district court. See, supra, at 18-20. The Trustee's misnomer does not alter this jurisdictional reality. As previously noted, supra, at 24, the district court's reference power in a liquidation proceeding under the 1970 Act is found at Rule 53 of the Federal Rules of Civil Procedure which by its terms precludes a general reference such as was accomplished by the May 31, 1973 reference order. In the final analysis the arguments advanced by Collier in support of the general reference of liquidation proceedings under the 1970 Act to an officer of the bankruptcy court all assume that there is no jurisdictional problem. Section 22a of the Bankruptcy Act, 11 U.S.C. §45a, can only be consistent with the provisions of the 1970 Act[15] if the 1970 Act expressly grants

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15. §6(c)(1) of the 1970 Act, 15 U.S.C. §78fff(c)(1); Securities Investor Protection Corporation v. Charisma Securities Corporation, supra, 506 F.2d at 1195.

the referee in bankruptcy or the bankruptcy court jurisdiction. Since the 1970 Act vests "exclusive" jurisdiction in the district court and allows for no exceptions to this grant of exclusive authority to act in proceedings under the 1970 Act, the general reference order of May 31, 1973 (Pet., ex. "E") was unauthorized and is jurisdictionally invalid.

Conclusion

Since the order directing a general reference of the proceedings under the 1970 Act for the liquidation of Weis Securities, Inc. is unauthorized and jurisdictionally invalid, the petition should be granted. Writs of mandamus and prohibition should issue from this court directing the Honorable Inzer B. Wyatt, District Judge, to resume jurisdiction over said liquidation proceeding and commanding the Honorable Roy Babitt, Bankruptcy Judge, not to take any

further proceedings in regard to said liquidation proceeding under the reference order of May 31, 1973.

Respectfully submitted,

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Daniel A. Zimmerman,
I. Alan Harris,

Of Counsel.

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO, et. al.,
Petitioners

-against-

INZER B. WYATT, et. al
Respondents,

Index No.

Affidavit of Service by Mail

~~against~~

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

-against-

WEIS SECURITIES, INC., et. al.,
Defendants.

STATE OF NEW YORK, COUNTY OF New York ss.:

Eugene L. St. Louis being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1235 Plane Street, Union, ~~NY~~ New Jersey

That upon the 19th day of March 1975, deponent served the annexed Petitioners Brief in support of petition~~ex~~ for Writ of Mandamus

upon Theodore H. Focht, General Counsel, ~~attorney(s) for~~
Securities Investor Prptection Corporation
in this action, at 900 Seventeeth Street, N.W., Washington, D.C.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 19th
day of March 1975

Eugene L. St. Louis

Print name beneath signature

Eugene L. St. Louis

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0119850
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO, ET.AL
Petitioners,
-against-
INZER B. WYATT, et.al
Respondents,
~~against~~ -
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
-against-
WEIS SECURITIES, INC., et.al.
Defendants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 19th *day of* March *19* 75 *at* see attached list

deponent served the annexed Petitioners' Brief in support of petition for writ of mandamus *upon* see attached list

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 19th
day of March *1975*

James Steele
JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0410350
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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HON. INZER B. WYATT
District Judge
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Foley Square
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HON. ROY BABITT
Bankruptcy Judge
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